

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHEYENNE E. STOUT

Claimant

V.

CHANUTE HEALTHCARE CENTER

Respondent

AND

PREMIER GROUP INSURANCE CO.

Insurance Carrier

Docket No. 1,063,194

ORDER

Claimant, by and through William L. Phalen, requests review of Administrative Law Judge Bruce E. Moore's July 23, 2015 Award. Terry J. Torline appeared for respondent and insurance carrier (respondent). The Board heard oral argument on December 8, 2015.

RECORD AND STIPULATIONS

The Board has considered the record¹ and adopted the Award's stipulations.

ISSUES

Claimant alleges injury to her back, buttocks, both legs and all other affected parts of her body from lifting a patient on or about March 22, 2012.

In the Award, the judge concluded claimant failed to prove personal injury by accident arising out of and in the course of her employment. The judge found the alleged March 22, 2012 accident was not the prevailing factor in causing claimant's injury, need for treatment or resulting impairment or disability.

Claimant argues she proved personal injury by accident arising out of and in the course of her employment. Claimant asserts the only "true" issue relates to prevailing factor and argues she must have injured herself primarily from the lifting incident at work.² Claimant asserts constitutional objections to the law as previously set forth in her submission letter and brief to the Board. Additionally, claimant requests payment of medical bills and future medical treatment.

Respondent argues the Board has no authority to rule on constitutional arguments and maintains the Award should be affirmed in all respects.

¹ The Award lists the preliminary hearing exhibits as part of the record. The content of the record was not an appealed issue.

² Claimant's Brief (Sept. 14, 2015) at 3.

The issues are:

1. Did claimant sustain personal injury by accident arising out of and in the course of her employment, including whether her asserted accident was the prevailing factor causing her injury, medical condition and resulting disability?
2. Is the Kansas Workers Compensation Act unconstitutional for violating due process and equal protection, including whether the Act violates due process for failing to provide an adequate or reasonable remedy?

FINDINGS OF FACT

Claimant, currently 21 years old, began working as a CNA for respondent in January 2012, shortly after she turned 18 years old.

Claimant testified her back “gave out” while attempting to lift a resident on March 22, 2012.³ She testified she fell to the ground and had immediate pain in her lower back radiating down her left leg. Claimant testified she immediately reported her accident to a supervisor. Claimant provided various times for her alleged accident, including 11:00 a.m., 11:30 a.m. and 1:00 p.m.

During her lunch break on March 22, 2012, claimant went on her own to her personal physician, Greta McFarland, M.D. The doctor’s report states:

Since she woke up this am, the back was hurting in this same area. She did go to work. She is a CNA at Chanute health care, and around 11 am she was holding someone, and then had shooting pains in the middle of the back and some on the right in the lumbar area. She fell completely down, landing on her buttocks. The pain occurred suddenly.⁴

Claimant made no complaints to Dr. McFarland of leg numbness or tingling and indicated her pain went up her back about 6-8 inches. While she denied prior back pain, claimant reported that for the prior two weeks, her back felt like it was “stuck” when bending forward.⁵ Dr. McFarland diagnosed claimant with acute back pain, ordered x-rays, prescribed medication and referred her to an orthopedist.

³ Claimant’s Depo. (Feb. 1, 2013) at 6.

⁴ P.H. Trans., Resp. Ex. A at 1.

⁵ *Id.*

Claimant denied telling Dr. McFarland that she woke up with back pain the morning of March 22, 2012, testifying, "That's not true,"⁶ and such information was "incorrect," "false"⁷ and not possible. She denied telling Dr. McFarland that she had back problems for two weeks prior to March 22, 2012, characterizing such information as "inaccurate"⁸ and not possible. Claimant denied any back problems whatsoever before March 22, 2012. Claimant further indicated Dr. McFarland's report was "inaccurate"⁹ because her pain was to the left side of her low back and down her left leg.

According to claimant, Dr. McFarland suggested she go back to work and fill out an accident report. Claimant testified she returned to work and her supervisor told her she needed to see a workers compensation physician, "Dr." Thomas Cloven.¹⁰

On March 23, 2012, claimant was seen by Brett Olson, P.A., a physician assistant for William Dillon, M.D. Mr. Olson recorded that claimant had "back pain in the lumbar spine that started yesterday when she woke up. . . . She has no known injury, however, she does a lot of lifting at her job. She denies any radicular symptoms or any weakness in the legs."¹¹ Claimant had negative straight leg raise testing bilaterally. Mr. Olson diagnosed claimant with low back pain and muscle spasm. He prescribed medication and physical therapy and provided work restrictions of no lifting for one week.

According to claimant, Mr. Olson's report that she woke up with back pain on March 22, 2012, was "false"¹² and not possible. Claimant denied telling Mr. Olson her lumbar pain started when she woke up on March 22, 2012. She also denied telling Mr. Olson that she had no known injury and, contrary to Mr. Olson's report, testifying she was having left leg radicular complaints when seen by Mr. Olson.¹³ She indicated it was not possible for her to have told Mr. Olson that she had difficulty with her back for two weeks prior to March 22, 2012.

⁶ Claimant's Depo. (Feb. 1, 2013) at 15.

⁷ P.H. Trans. at 15, 27-28.

⁸ Claimant's Depo. (Feb. 1, 2013) at 18; see also P.H. Trans. at 28, 54.

⁹ Claimant's Depo. (Feb. 1, 2013) at 16.

¹⁰ P.H. Trans. at 14. Mr. Cloven is a physician assistant, not a medical doctor.

¹¹ *Id.*, Resp. Ex. B.

¹² *Id.* at 28.

¹³ Claimant's Depo. (Feb. 1, 2013) at 19-21.

On March 23, 2012, claimant completed a "Workers Compensation Reporting Form" for respondent indicating the date and time of her incident as March 22, 2012, at 11:30 a.m., and the date and time that she reported the incident as March 23, 2012, at 10:50 a.m. In response to a question on the form asking exactly what happened, claimant wrote: "I was having severe back problems & I went to the doctor & orthopedic. They said I am having back spazams [sic] due to lifting residents."¹⁴

That same day, March 23, respondent sent claimant to Mr. Cloven for an evaluation. Claimant reported injuring her back while lifting a resident. Mr. Cloven noted claimant did not immediately report such incident to her supervisor. He recorded that claimant had palpable lumbar paraspinous spasm, but no pain radiating down her lower extremities. Mr. Cloven diagnosed claimant with back pain. He concurred with Mr. Olson's treatment recommendations.

Claimant testified Mr. Cloven's statement that she waited one day to give notice was inaccurate. Claimant also testified Mr. Cloven's recording of no pain radiating down her lower extremities was inaccurate.

Claimant never returned to work for respondent. She left her employment with respondent in early-April 2012 because she wanted a job that did not involve lifting. On May 13, 2012, she started working as a CNA at Applewood Rehabilitation, Inc. (Applewood). Claimant testified this job involved no lifting, bending or twisting. Claimant denied having an accidental injury while working at Applewood.

On July 31, 2012, claimant returned to Mr. Olson with complaints of "low back pain and left leg radicular symptoms."¹⁵ She reported left-sided lower back pain that went over her anterior thigh. Examination revealed positive straight leg raise testing on the left and negative on the right. Mr. Olson diagnosed claimant with low back pain with left leg radiculopathy and ordered an MRI.

On August 1, 2012, claimant had the lumbar MRI. She partially completed and signed an MRI Patient Screening stating she had "lower back pains & pains in lt leg."¹⁶ According to claimant, the radiology technician must have written, "Ø injury - 1½ wks ago pain got worse - limited ROM" after claimant signed the form.¹⁷ Claimant testified she did not tell the technician why she needed the MRI and the information the technician wrote on the form was not true.

¹⁴ P.H. Trans., Resp. Ex. C at 1.

¹⁵ *Id.*, Cl. Ex. 2 at 3.

¹⁶ Stein Depo., Ex. 6.

¹⁷ *Id.*, Ex. 6 and Claimant's Depo. (Feb. 6, 2015) at 19-21.

The MRI was read as showing degenerative changes from L3-S1, a minor herniated disc at L3-4, a herniated disc at L5-S1 and facet joint arthritis at L3-4 and L4-5.

Claimant returned to Mr. Olson on August 3, 2012. Mr. Olson reviewed the MRI and noted claimant's left Achilles tendon reflex was diminished. He recommended medication and physical therapy.

Claimant returned to Mr. Olson on August 20, 2012, for low back and left leg pain. She indicated medication provided no relief and she had been unable to complete therapy due to the flu. She denied leg numbness or tingling. Mr. Olson recommended epidural steroid injections. A series of three injections was performed by Dr. Gibbs. Following the injections, Mr. Olson referred claimant to Brent Adams, M.D.

Dr. Adams examined claimant on October 26, 2012. As part of the examination, claimant completed a pain drawing showing ache, pins and needles and stabbing pain in her left lower back and possibly her buttocks. Claimant testified the pain drawing she filled out was inaccurate because it did not show numbness in her left leg.¹⁸ At her deposition, she drew symbols on the left thigh of the figure in the pain drawing, as reflective of a pins and needles sensation. Claimant testified such symptoms were present from March 22, 2012 forward.

Dr. Adams reported claimant had "no radicular complaints," was currently working as a certified nurse and "is doing quite a bit of heavy lifting" and was "trying to get a more light-duty-type job."¹⁹ Dr. Adams interpreted the MRI study as revealing degenerative disc disease at L3-4, L4-5, and L5-S1 with disc dehydration. He diagnosed claimant with juvenile degenerative disc disease of the lumbar spine. Due to claimant's age, Dr. Adams recommended ongoing conservative care and that "she get into a lighter-duty-type job."²⁰

Claimant could not explain why Dr. Adams' report said she did a lot of heavy lifting at Applewood. She reiterated her job at Applewood involved no lifting.

On January 1, 2013, claimant left her employment with Applewood and, on January 7, 2013, accepted a position with Tri-Valley Developmental Services as a residential service provider. She described her duties as driving to residents' homes, checking on their status on at least a daily basis, and assisting them in any way they needed, such as cooking, grocery shopping, cleaning, vacuuming and dishwashing.

¹⁸ Claimant Depo. (Feb. 1, 2013) at 27.

¹⁹ P.H. Trans., Resp. Ex. F at 1.

²⁰ *Id.*

On January 22, 2013, claimant was seen at her attorney's request by George Fluter, M.D., who is board-certified in physical medicine and rehabilitation. Claimant provided a history of her back giving out while she was lifting a resident on March 22, 2012, but she was able to get the resident into bed before falling to the ground. Dr. Fluter diagnosed claimant with low back/left thigh pain, lumbosacral strain/sprain, multilevel lumbar discopathy, probable facet arthrosis, and probable sacroiliac joint dysfunction. Dr. Fluter stated there was a "causal/contributory relationship between [claimant's] current condition and the reported work-related injury occurring on 03/22/12 [and t]he prevailing factor for the injury and the need for medical evaluation/treatment is the reported work-related injury occurring on that date."²¹ Dr. Fluter identified no other prevailing factor.

Dr. Fluter provided light duty restrictions and recommended medication, an EMG, a lumbar brace, water therapy, physical therapy, a TENS unit, injections and an evaluation or second opinion by a neurosurgeon and/or an orthopedic spine surgeon.

Following a June 12, 2013 preliminary hearing, the judge ordered respondent to pay medical expenses incurred to date and appointed Paul Stein, M.D., to determine whether the alleged accident was the prevailing factor in causing claimant's injury, need for medical treatment, or resulting disability or impairment, if any.

On August 12, 2013, claimant was seen by Dr. Stein, a board-certified neurosurgeon. Claimant reported was she was lifting a resident and her "back gave out and [she] dropped him."²² Claimant complained of left lower back pain with occasional radiation into her left thigh to the knee. She denied any leg numbness or tingling. Straight leg raising on the left produced mild left lower back discomfort without radicular features.

In addressing causation and prevailing factor, Dr. Stein stated:

Ms. Stout began having lower back pain subsequent to assisting a resident at work on 3/22/12. There is no history or documentation of prior lumbar symptomatology. The underlying pathology, however, is degenerative in nature. This is not typical at 18 years of age but is not unheard of and the degenerative changes were not caused by the incident at work. Given the mechanism of injury and the degenerative changes the primary or prevailing factor in the current symptomatology and need for treatment is the preexisting degenerative change. Absent this degenerative change the mechanism of injury at work was not likely to cause permanent injury and this degenerative change at her young age is likely to have become symptomatic absent the incident at work. The relationship between the incident at work and the current symptoms is one of aggravation of the preexisting pathology.²³

²¹ *Id.*, Cl. Ex. 1 at 5.

²² Stein Depo., Ex. 1 at 1.

²³ *Id.*, Ex. 1 at 5.

Dr. Stein recommended a long-term program of abdominal and lumbar muscular strengthening through therapy and exercise. Given claimant's underlying pathology and young age, Dr. Stein suggested claimant find alternate employment not requiring repetitive bending and twisting or frequent and heavy lifting.

Dr. Stein's deposition occurred on January 14, 2014. Dr. Stein acknowledged lifting can cause a herniated disc. He acknowledged claimant did not have a significant prior history of back pain or radiculopathy and was asymptomatic before lifting a patient on March 22, 2012. Dr. Stein agreed claimant's herniated discs were structural changes in her body. When questioned regarding the mechanism of injury, Dr. Stein acknowledged he did not know the weight of the patient claimant was lifting or if the patient was "dead weight" or shifting. Dr. Stein agreed that a factor in claimant's injury and her need for medical treatment was her lifting the patient and the lifting "very likely" caused claimant's herniated disc at L5-S1.²⁴ Dr. Stein agreed that had claimant just stayed home and not gone to work on March 22, 2012, she probably would not have suffered a herniated disc that day. However, Dr. Stein maintained his opinion that the prevailing factor in claimant's injury and medical condition was her preexisting degenerative disc disease: absent the preexisting juvenile degenerative disc disease, the injury would not have occurred.

Dr. Stein generally agreed that the medical records, which indicated claimant had significant left leg pain for about one and one-half weeks before July 31, 2012, indicated "clearly something occurred at that time"²⁵ and caused claimant's disc herniation.

After receiving and reviewing Dr. Stein's deposition, as well as the comments of counsel, Judge Moore issued a January 31, 2014 Order stating:

Given the diagnosis of juvenile degenerative disc disease, the questionable nature of whether there ever was a specific lifting incident, the significant delay between the claimed incident and the onset of radicular complaints, and the opinion of the court-ordered neutral examiner that the claimed incident was not the prevailing factor in causing Claimant's injury, or need for treatment, the court **FINDS** and **CONCLUDES** that **Claimant has failed to sustain her burden of proof of personal injury, by accident, arising out of and in the course of her employment.** The court further **FINDS** and **CONCLUDES** that whatever occurred on March 22, 2012 was *not* the **prevailing factor** in causing Claimant's injury, need for treatment or resulting impairment or disability.²⁶

²⁴ *Id.* at 40.

²⁵ *Id.* at 55.

²⁶ ALJ Order at 5. (Emphasis in original.)

The preliminary hearing order was appealed to the Board. In a March 31, 2014 Order, a single Board Member affirmed the preliminary hearing Order.

On June 12, 2014, Dr. Fluter issued a supplemental report without examining claimant or knowing whether claimant had any additional treatment or any change in her condition. Dr. Fluter rated claimant at 11% whole person impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) based on a 10% whole person impairment for lumbosacral impairment and a 1% whole person impairment for left-sided sacroiliac joint dysfunction. Dr. Fluter opined claimant's work-related accident was the prevailing factor causing her injuries, need for medical treatment and resulting impairment. Dr. Fluter imposed permanent work restrictions and indicated claimant would need future medical treatment.

Dr. Fluter testified that 85% of his practice involves medical/legal evaluations and essentially all of that work is for claimants' attorneys. He acknowledged the history claimant provided to him varied from histories she gave Dr. McFarland and Mr. Olson. Dr. Fluter acknowledged claimant had degenerative changes and disc herniations, but testified his work-related diagnosis for claimant involved ligament sprains and muscular strains of claimant's low back. He testified:

Well, I felt that the clinical findings were more consistent with a sprain/strain injury and also findings consistent with radiculopathy. Those structures involved, sprain/strain being muscles, tendons and ligaments, radiculopathy being actual nerve dysfunction, are separate from the spine, the vertebrae and the discs. So to me, while the spine and the degenerative changes are certainly considered as a factor, in my opinion they were not the prevailing factor for the clinical findings that I found on my examination.²⁷

Claimant testified she continues to have constant pain in the lower left side of her back which radiates down her left leg. She indicated prolonged sitting and standing increase her pain and her pain awakes her once or twice a night. She has not received any treatment since June 12, 2013.

In the July 23, 2015 Award, the judge stated:

Given the diagnosis of juvenile degenerative disc disease, the questionable nature of whether there ever was a specific lifting incident, the significant delay between the claimed incident and the onset of radicular complaints, and the opinion of the court-ordered neutral examiner that the claimed incident was not the prevailing factor in causing Claimant's injury, or need for treatment, the court **FINDS** and **CONCLUDES** that Claimant has failed to sustain her burden of proof of

²⁷ Fluter Depo. at 28.

personal injury, by accident, arising out of and in the course of her employment. The court further finds and concludes that whatever occurred on March 22, 2012 was not the prevailing factor in causing Claimant's injury, need for treatment or resulting impairment or disability. Rather, the prevailing factor for her complaints was her pre-existing and non-work-related juvenile degenerative disc disease, which may, or may not, have been rendered symptomatic by her work duties. Dr. Stein's independent medical opinion is that something happened in mid-July, 2012 to cause the onset of radicular complaints, but it was not the incident of March 22, 2012.

. . .

Claimant has failed to sustain her burden of proof of having suffered personal injury by accident arising out of and in the course of her employment with Respondent. Claimant woke up with back pain on March 22, 2012, and may have had an increase in pain while standing and holding a resident. She initially reported no accident to her personal physician, and had no radicular complaints at the time of presentation. Claimant did not return to work for Respondent and had no further treatment. Claimant then went to work for another facility as a CNA. While she denies doing any lifting in that subsequent employment, she reported a significant increase in low back pain and onset of radicular symptoms in the two weeks leading up to July 31, 2012, while employed as a CNA with Applewood Rehabilitation. Dr. Stein, the court's expert, believes Claimant suffered a herniated disc concurrent with the increase in pain and onset of radicular pain, more than three months after Claimant last worked for Respondent.

Claimant has also failed to sustain her burden of proof that there were any unpaid medical bills, that she is entitled to future medical treatment, or that the provisions of the Kansas Workers Compensation Act are unconstitutional.²⁸

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee for personal injury by accident arising out of and in the course of employment. Whether an accident arises out of and in the course of employment is fact dependent.²⁹ The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must be proven before compensation is allowed. Claimant has the burden to prove the right to an award using a "more probably true than not true" standard based on the whole record.³⁰

²⁸ ALJ Award at 12 (emphasis in original).

²⁹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

³⁰ K.S.A. 2011 Supp. 44-501b(b) and K.S.A. 2011 Supp. 44-508(h).

K.S.A. 2011 Supp. 44-508 states, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Based on K.S.A. 2011 Supp. 44-555c(a), the Board has exclusive jurisdiction to review all decisions, findings, orders and awards of a judge under the Kansas Workers Compensation Act. Board review of a judge's order is de novo on the record.³¹ The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.³² The Board, on de novo review, makes its own factual findings.³³

While Board review of a judge's order is de novo on the record,³⁴ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder.³⁵ The Board often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.³⁶

ANALYSIS

Injury by accident does not arise out of employment unless the accident is the prevailing factor in causing the injury, medical condition and resulting disability or impairment.

As an initial matter, the judge was clear that he found claimant not to be credible. Some of the Award's listed reasons for finding claimant not credible are less incriminating than others. For instance, whether claimant's accident occurred at 11:00 a.m., 11:30 a.m. or 1:00 p.m., the sequence in which she saw Mr. Cloven or Mr. Olson or whether claimant reported her asserted accident on March 22 or March 23 seem relatively inconsequential. Whether claimant was lifting or holding a resident when she claimed injury seems to put semantics ahead of the fact claimant was moving or transferring a resident, i.e., doing her job, when she said she was hurt. Admittedly, her falling while being able to place the resident back into bed seems a bit farfetched and inconsistent with the history she gave Dr. Stein that she dropped the resident.

³¹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

³² See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

³³ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

³⁴ See *Helms*, *supra*.

³⁵ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

³⁶ It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

The Board nonetheless agrees there are substantial reasons to question claimant's credibility, mainly her insistence that medical records deviating from her professed version of events are false, incorrect or not possible. She denied telling Dr. McFarland that she woke up the morning of March 22 with back pain. She denied telling Dr. McFarland that for the prior two weeks when she moved her back forward she felt as if her back was stuck. Claimant also denied telling Dr. McFarland that her pain was in the middle and right side of her back, but was instead in her left low back with pain going down her left leg.

Claimant denied telling Mr. Olson that her back pain started when she woke up on March 22. She denied telling Mr. Olson that she had no known injury. Mr. Olson's report indicated claimant did not have radicular symptoms and a negative straight leg raising test, but claimant insists she had left leg radicular pain at the time. Claimant also told Mr. Cloven she did not have pain radiating into her legs, despite Mr. Cloven's contrary report.

Claimant testified information in Dr. Adams' report about her doing quite a bit of lifting subsequent to her work for respondent was incorrect. She also contends the MRI technician added unfavorable information to the MRI Patient Screening after claimant had already put information on the form and signed it. By our count, claimant testified documents prepared by at least five medical professionals were false, wrong or inaccurate. Claimant would have been the source for such information.

Claimant also filled out an accident report stating doctors told her she had back pain from lifting residents. This information is consistent with her telling Mr. Olson she had no known injury, but did a lot of lifting at work. Still, it is odd claimant would not specifically mention lifting a particular resident in her accident report, after she told Dr. McFarland and Mr. Cloven she was hurt holding or lifting someone, in addition to her testimony.

We conclude claimant did not have radicular symptoms until July 31, 2012. We agree with the judge's assessment that something happened to claimant in July 2012 to cause her radicular symptoms.

Dr. Stein, while aware claimant was alleging her injury was due to lifting a resident, opined the prevailing factor in causing claimant's current injury, medical condition, and resulting disability or impairment was her preexisting juvenile onset degenerative disc disease. We agree with the judge having adopted such opinion and we reject Dr. Fluter's opinion that the prevailing factor was the asserted accident.

We cannot disregard the medical records showing claimant woke up with pain on March 22, 2012, and had a feeling as if her back was catching for two weeks prior. We conclude claimant did not prove personal injury by accident arising out of and in the course of her employment with respondent. Based on Dr. Stein's prevailing factor opinion, the Board finds claimant's accident did not arise out of employment based on K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii).

Claimant argues the Kansas Workers Compensation Act is unconstitutional. The Board does not have the authority to find the Act unconstitutional. Claimant may preserve her arguments for future determination before a proper court.

CONCLUSIONS

After carefully reviewing the entire record compiled to date and considering all of the parties' arguments, the Board concludes claimant did not prove personal injury by accident arising out of and in the course of her employment, including that she failed to prove her accident was the prevailing factor in her injury, need for medical treatment and any resulting disability. The judge and the Board cannot address the constitutionality of the Act.

AWARD

WHEREFORE, the Board affirms the July 23, 2015 Award with the exception of the judge addressing the constitutionality of the Act.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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